United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

ORIGINAL

74-2370

(42149)

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

GERARD and GEMMA BRAULT,

Plaintiffs-Appellants

v.

TOWN OF MILTON,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Vermont for En Banc Consideration

BRIEF OF THE *AMICUS CURIAE*

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BRIEF OF THE *AMICUS CURIAE*

Preliminary Statement

This appeal is taken from the order of the United States District Court for the District of Vermont (COFFRIN, J.), dated October 8, 1974, dismissing this action brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331 on the ground that the Town of Milton was not a "person" within the meaning of 42 U.S.C. §1983.

A divided panel of this Court reversed the order of the district court on the ground that jurisdiction was properly based upon 28 U.S.C. §1331 and that a cause of action upon which relief could be granted could be implied directly from the 14th Amendment.

Appellee petitioned this Court for a rehearing *en banc*. The City of New York submitted a brief *amicus curiae* in support of the appellee's application. On April 17, 1975, this Court granted appellee's application. On May 5, 1975, the City of New York was granted permission to file an *amicus curiae* brief on the *en banc* reconsideration.

Questions Presented

1. May the courts imply a cause of action directly from the 14th Amendment?
2. Even if the courts have the power to imply a cause of action, should they do so in the instant case in order to impose liability on a municipality which is immune from liability under 42 U.S.C. §1983?
3. Was the appellants' federal claim barred by prior litigation in the courts of the State of Vermont?

Statement of the Case

The underlying facts relevant to this appeal and the prior proceedings had herein both in the court below and in the courts of Vermont are set forth in the opinion of the panel majority and in the papers submitted by the parties.

Applicable Constitutional and Statutory Provisions

United States Constitution

Article Four

> Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judi-

cial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

14th Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Statutory Provisions

42 UNITED STATES CODE

§1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 UNITED STATES CODE

§1331

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

• • •

§1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

§1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the

clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

POINT I

Appellants' suit was properly dismissed because they can state no cause of action for which relief can be granted to them in the federal courts. Congress has not created a statutory cause of action which is applicable to the case at bar and the courts are without power to imply such a cause of action directly from the 14th Amendment. Even if the federal courts possess the power to imply a cause of action directly from the 14th Amendment, that power should not be exercised to impose liability upon municipalities.

(1)

In an opinion dated February 21, 1975, a majority of a panel of this court held that a municipality could be held liable for damages in an action founded directly upon the 14th Amendment if the jurisdictional amount requirement of 28 U.S.C. §1331 was satisfied. We submit that this decision is wrong and should be overruled.

Before discussing what we consider to be the analytical flaws in the approach taken by the majority, we shall first consider the authorities which the court cited in its opin-

ion and upon which it relied. It is perhaps helpful to consider first Professor Dellinger's article, *Of Rights and Remedies*: The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972). As to most of that article, largely devoted to an analysis of *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), we have no complaint. However, on one point, some comment is appropriate.

In his article, in the pages cited in the panel majority's opinion (85 Harv. L. Rev. at 1558-59), the professor states (*id.* at 1559), "[s]ection 1983 may simply be unnecessary." We submit that the problem may not be so easily disposed of. Otherwise, by the same token, also "unnecessary" have been the labors of the courts in cases such as *Monroe* v. *Pape,* 365 U.S. 167 (1971), and *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), and a host of other cases where the courts, taking the matter very seriously, and indeed evidencing great difficulty, have wrestled with the question of §1983 jurisdiction. If this question was as simple as Professor Dellinger and the panel majority appear to indicate, one may only wonder why this simple answer took so long to appear. One may wonder why, for example, it did not occur to Mr. Justice Douglas as he was working on his monumental opinion in *Monroe* v. *Pape,* 365 U.S. 167 (1963). See *Monroe,* supra, at page 169, where it is noted that the plaintiff did in fact allege as an alternative basis for federal jurisdiction Section 1331, although this basis for federal jurisdiction was apparently not urged on the appeal. See, also, *City of Kenosha* v. *Bruno, supra,* where the Court, in a case not involving damages, but only equitable relief, declined to pass on the issue of Section 1331 jurisdiction—so easily answered by Professor Dellinger—without additional briefs and argument in the lower courts.* At the very

* Although the majority pointed out in *Kenosha* that jurisdiction might be available under §1331 it did not indicate the source of a right to relief. That is precisely the question at issue here.

least, these cases strongly suggest that the matter of implying a cause of action for violation of the 14th Amendment is not nearly so simple as Professor Dellinger and the panel majority in the instant case would have it.

Further undercutting the view that Section 1331 jurisdiction may be freely expanded and new constitutional torts created is the *Bivens* decision itself. In *Bivens* the plaintiff alleged that the defendants, six federal agents, violated his 4th Amendment right to be secure from unreasonable searches and seizures when they entered his home without a warrant and searched the premises. The district court dismissed the complaint for failure to state a cause of action. This Court affirmed the district court. The Supreme Court reversed, holding (403 U.S. at 389) that the 4th Amendment gives rise to a cause of action for damages when it is violated by a federal agent acting under color of his authority. The Court found it anomalous that the plaintiff, who alleged a deprivation of federal rights by federal agents, should be compelled to resort to the state courts for a remedy. This anomaly was compounded by the defendants' admission that, as a matter of policy, they removed such suits to the federal courts. Thus, under one view, *Bivens* may be regarded as simply giving to that plaintiff the same choice of forum already available to the defendant federal agents.

The *Brault* majority finds in *Bivens* "sweeping approbation of constitutionally based causes of action" (slip op., p. 1874). Very respectfully, we find no such "sweeping approbation" in *Bivens* as would warrant radical extension of that 6-3 holding of the Supreme Court (Harlan, J., concurring but counseling restraint) of the sort which has taken place in *Brault*. More specifically, *Bivens* imposed liability on the agents themselves, in a classic tort situation, where the Court's opinion clearly exhibits concern that if plaintiff did not have a federal remedy in

federal court, he would, as a practical matter, be remediless. Further, *Bivens* does not, as the *Brault* majority appears to assume, necessarily sanction an award of money damages as the remedy for *any* violation of a constitutional right. Rather, it expressly recognizes that "special factors", including the question of who is to pay such damages, and the presence or absence of congressional declarations on the subject, must be considered in determining the appropriateness of this remedy. See 403 U.S. at 396-97.

Bivens is clearly distinguishable from the *Brault* situation in that in *Brault* we have specific evidence of congressional intent, expressed in Section 1983 and exhaustively documented in *Monroe* v. *Pape,* that municipalities should not be held liable in federal court for violations of the 14th Amendment. Furthermore, in *Brault* the conduct of the defendant town was nothing like the sort of tortious conduct alleged in *Bivens.*

With respect to the *Brault* majority's reliance upon *Dupree* v. *City of Chattanooga,* 362 F. Supp. 1136 (E.D. Tenn., 1973), we would note, intially, that that court, in finding Section 1331 jurisdiction, cites *City of Kenosha* v. *Bruno,* as well as other cases, but does so without discussion and without bothering to note that this most difficult question was expressly left open in *City of Kenosha.* Furthermore, the *Brault* majority fails to note that *Dupree* was an action for declaratory and injunctive relief, not damages—a distinction which may well be of significance in light of the legislative history of Section 1983. See *Monroe* v. *Pape, supra; City of Kenosha* v. *Bruno, supra,* 412 U.S. at 516-17 (Douglas, J., concurring); but see the majority opinion in *City of Kenosha,* apparently reject-

ing, by its silence on the point this distinction suggested by Justice Douglas.*

(2)

Prior to the panel's decision in the instant case, this court had refused to imply a cause of action directly from the Fourteenth Amendment. In *Fischer* v. *City of New York,* 312 F.2d 890 (2nd Cir., 1963), this Court held that the plaintiff's claim against the City was barred because a municipality is not liable under Section 1983. The Court went on to add: "Insofar as plaintiff's claim is based, not on the Civil Rights Act, but directly upon Section 1 of the 14th Amendment, we affirm on the ground that plaintiff has not stated a claim upon which relief can be granted . . . ." Although that case is on all fours with the case at bar, it was rendered prior to *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971), which introduced the novel concept of a cause of action founded directly upon the Constitution. We submit for the reasons given *infra* that despite the *dicta* in *Bivens,* which was relied upon by the panel majority in *Brault, Fischer* correctly refused to create a constitutional cause of action for violation of the 14th Amendment.

Whatever "sweeping approbation" *Bivens* may give to causes of action founded upon other provisions of the

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* In our research, we have uncovered but one other appellate decision appearing to hold that a damage action may be maintained under Section 1331 based upon a claimed violation of the 14th Amendment (together with the First Amendment), *Skehan* v. *Board of Trustees of Bloomsburg State College,* 501 F. 2d 31 (3rd Cir., 1974). In the Court's discussion of jurisdiction, however, no mention was made of *Kenosha* or any other court decision, and the question of such jurisdiction is discussed most perfunctorily.

Constitution, we submit that it affords no basis for premising a cause of actoin upon the 14th Amendment. The Court in *Bivens* recognized that the Fourth Amendment does not provide for its enforcement and proceeded to imply a remedy in damages where Congress had not taken affirmative action (p. 396). The Fourteenth Amendment, on the contrary, provides quite clearly, in Section 5, that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We submit that the power of enforcement conferred upon Congress by Section 5 is plenary and complete and has been exercised by it in the various civil rights laws. We further submit that the 14th Amendment vests no residual power in the judicial branch to create a cause of action not authorized by Congress to vindicate rights granted by that amendment.

When Senator Howard introduced the proposed 14th Amendment of the Constitution in the Senate on May 23, 1866, he said concerning Section 5:

> "It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or anyone of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no state infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposes upon Congress this power and duty." *Cong. Globe,* 39th Cong., 1st Sess., 2768.

Jonathan Bingham of New York, an important proponent of passage of the Fourteenth Amendment, also em-

phasized the congressional role in enforcement of the amendment:

> "The proposition pending before the House is simply a proposition to arm the Congress . . . with power to enforce the Bill of Rights as it stands in the Constitution today. . . ." *Cong. Globe,* 39th Cong., 1st Session, p. 1088.

Only thirteen years after the ratification of the 14th Amendment, the Supreme Court took the opportunity to comment upon Section 5 in *Ex Parte Virginia,* 100 U.S. 313 (1879), a case challenging the Civil Rights Act of March 1, 1875. There the Court stated (at p. 346):

> "All of the Amendments derive much of their force from this latter provision [Section 5]. It is not said the judicial power of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged."

This same position was reiterated by Justice Harlan in his dissent in the *Civil Rights Cases,* 109 U.S. 3, 45-46 (1883), and reaffirmed by Justice Brennan in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). In the latter case it is stated (at p. 651):

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guaranties of the Fourteenth Amendment."

Of course, we do not suggest that the 14th Amendment would be a nullity without congressional action pursuant to Section 5. Obviously, the 14th Amendment, like any other provision of the Constitution, can be raised defensively in an appropriate forum. We submit, however, that a cause of action to affirmatively vindicate 14th Amendment rights must be created by Congress, which is alone empowered to enforce the 14th Amendment.* Indeed, Congress appears to have accepted this interpretation of its role under the 14th Amendment by its enactment of the predecessor statute of 42 U.S.C. §1983 and 28 U.S.C. §1343, the Act of April 20, 1871.

The Congress which enacted the Act of April 20, 1871, had adopted the 14th Amendment less than three years before. It can be presumed that Congress had a clear view of its power under the Amendment. The Act of April 20, 1871 created a substantive cause of action to enforce the 14th Amendment (now 42 U.S.C. §1983) and gave jurisdiction over this cause of action to the federal courts (now 28 U.S.C. §1343(3)). Obviously, if the Congress believed that the 14th Amendment conferred upon the federal judiciary some residual power to enforce it through the creation of causes of action, it would not have created the substantive cause of action. If this Court's analysis in *Brault* of its power to affirmatively enforce the amendment is correct, then Congress was wasting its time in creating a cause of action in the Act of April 20, 1871. All that was required was a jurisdic-

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* The 4th Amendment which was at issue in *Bivens*, unlike the 14th Amendment, at issue here, does not purport to confer enforcement power upon any branch of the government. It is, therefore, more susceptible to being interpreted, as it was in *Bivens*, as conferring the power to enforce it jointly upon the legislative and judicial branches.

tional provision. Such a conclusion hardly comports with the deferential attitude traditionally shown by our courts toward the action of a coordinate and popularly elected branch of the government.

We submit that the 14th Amendment clearly contemplates its enforcement by the Congress; that the Congress has enforced it; and that the Courts are without power to create an additional remedy.

(3)

Assuming, but not conceding, that the federal courts retain some power to fashion affirmative remedies based upon the 14th Amendment, we submit that the panel majority erred in the instant case in creating a cause of action for damages applicable to municipalities. As noted above, Congress created by the Act of April 20, 1871, a cause of action to enforce the 14th Amendment and conferred upon the federal courts jurisdiction to entertain actions to enforce such cause of action. This cause of action, however, has been repeatedly held by the Supreme Court not to apply to municipalities. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). As shown by Mr. Justice Douglas in his opinion in *Monroe* v. *Pape*, the Congress specifically rejected a proposed amendment to the Act of April 20, 1871, which would have imposed liability upon municipalities. We submit that the panel in the instant case should have deferred to the clear congressional intent to exclude municipalities from liability for violations of the 14th Amendment.

In *Bivens*, which is the principle case upon which the panel decision rests, the Supreme Court did say, as quoted,

> "But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell* v. *Hood*, 327 U.S., at 684." *Bivens*, at p. 396.

But this "sweeping approbation" of constitutionally based causes of action was quickly qualified by the Court in the very next sentence, which is not included in the quotation as it appears in the panel majority's decision: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." The Supreme Court then went on to indicate what it meant by "special factors" counselling hesitation:

> "Finally, we cannot accept respondents' formulation of the question as to whether the availability of money damages is necessary to enforce the Fourth Amendment. *For we have here no explicit declaration* that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." *Bivens, supra*, at p. 397 (emphasis added).

In the case at bar there is present the precise special factor counselling hesitation of which the Supreme Court warned in *Bivens*. The Supreme Court in *Monroe, Moor* and *City of Kenosha* has made crystal clear Congress' intent to exclude municipalities from liability for violations of §1983, which creates an explicit statutory cause of action for violations of the 14th Amendment. Nevertheless, the panel majority in the instant case apparently

concluded that this clear congressional intent did not counsel any hesitation in imposing liability upon municipalities for violations of constitutional rights. See, *contra*, *Perzanowski* v. *Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Smetanka* v. *Borough of Ambridge*, 378 F. Supp. 1366 (W.D.Pa., 1974).

In reaching its decision the panel majority implied that the congressional intention to exempt municipalities from liability under the Act of April 20, 1871, was somehow vitiated by the passage of the Act of March 3, 1875. This statute (now, as subsequently amended, 28 U.S.C. §1331 (a)) gave to the federal courts original jurisdiction in civil actions wherein the matter in controversy was of a sum or value exceeding $500 (now $10,000) and arose under the Constitution, laws or treaties of the United States. The panel majority reasoned that in passing the Act of March 3, 1875, Congress decided that the municipal exemption from liability granted by the Act of April 20, 1871 was to be limited to cases in which the matter in controversy had a value less than the $500 jurisdictional amount required by the Act of March 3, 1875. In other words, the Act of March 3, 1875, empowered the federal courts to entertain a case which was based directly on the 14th Amendment if the plaintiff's claim against the municipal defendant had a value in excess of the $500 jurisdictional amount. If, however, the claim was valued at less than $500, the plaintiff's only entry to the federal courts was pursuant to the Act of April 20, 1871 (now 42 U.S.C. §1983) which, while affording entry to the federal courts, unfortunately precluded recovery by virtue of its grant to municipalities of an exemption from liability. We submit that this peculiar jurisdictional scheme suggested by the panel's decision as a means of harmonizing its construction of 28 U.S.C. §1331 with Congress' intention to exclude municipalities from liability under 42

U.S.C. §1983 has no basis in the history of 28 U.S.C. §1331, and in fact makes no sense at all. It preserves the hard fought for municipal immunity from damages where the exposure to liability is trivial (less than $10,000; originally $500), but wipes out such immunity where the exposure is—to an unlimited extent—greater.

Prior to the enactment of the Act of March 3, 1875, United States citizens had to secure in state courts the vindication of rights conferred by federal law. With the passage of the Act, a vast range of powers which had lain dormant in the Constitution since 1789 were conferred upon the federal courts. This immense expansion of the power of the federal judiciary barely received a contemporary comment. Indeed, the Act, unlike the Act of April 20, 1871, evoked so little debate on the floor of the Congress that the Supreme Court has described the Act as "rather hastily passed." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 548 (1971). The bill as originally passed by the House did no more than amend the procedures governing removal proceedings. In the Senate, the Judiciary Committee proposed the bill in its present form as a substitute for the House bill. The substitute was passed by the Senate on the very day of its introduction. Eventually the bill went to conference where the Senate version emerged unchanged. The House then passed it and the President signed it on March 3, 1875. *See* Frankfurter and Landis, *The Business of the Supreme Court,* pp. 65-69.

In *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), the Supreme Court held that the plaintiffs, who were prisoners seeking restoration of good-time, could not commence an action under 42 U.S.C. §1983 in order to avoid the requirement of *habeas corpus* that state court remedies must be exhausted before a federal action can be commenced. The Court stated at pages 489-490:

> "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983."

In creating a remedy for violation of the Fourteenth Amendment the Congress clearly intended to immunize municipalities from liability. If this court is free to imply a cause of action from the Fourteenth Amendment pursuant to an historically silent congressional grant of jurisdiction, we submit that it should not exercise this power to frustrate the clear congressional intention to immunize municipalities from liability. Under these circumstances, we contend, there exists, in the language of *Bivens,* a strong "special factor" counselling the court to either refuse to create a cause of action founded directly upon the 14th Amendment, or else to extend to that cause of action the same municipal exemption from liability granted by Congress when it created the statutory cause of action for violation of the 14th Amendment.*

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* Illustrative of the approach which we believe is here called for is, in addition to *Bivens,* the Supreme Court's very recent decision declining to allow the award of counsel fees in federal courts in the absence of statutory authorization. *Alyeska Pipeline Service Co.* v. *The Wilderness Society,* — U.S. — (May 12, 1975) 43 U.S.L.W. 4561. While on its facts and in terms of the precise

(Footnote continued on following page)

(4)

In addition to the clear congressional intent to grant to municipalities an exemption from liability for violations of the 14th Amendment, there is another special factor counselling hesitation in deciding that the 14th Amendment implies a federal cause of action for its violation. The 14th Amendment is by its language directed towards *state action.* Implicit, albeit unstated, then, in the panel majority's decision is a finding that the Town of Milton's actions were state action for purposes of the 14th Amendment. Ironically, however, if the Town was in fact a state it would be immunized from liability for damages via the 11th Amendment. Of course, it is settled law that a city is not a state for the purpose of claiming immunity under the 11th Amendment. *Lincoln County* v. *Luning,* 133 U.S. 529 (1890); *Hopkins* v. *Clemson College,* 221 U.S. 636 (1911). We submit that it is an odd result to hold that a municipality is a state for the purpose of

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(*Footnote continued from preceding page*)

issue presented that decision is clearly not in point, analytically it is quite in point. First, *Alyeska* seems clearly to indicate that, to the extent that this court may have the power to adopt a particular rule, that raw, naked power of the judiciary does not answer the question of whether the rule *should* be adopted. It is not enough that the judiciary prefer a rule; other elements besides judicial power and preference must be considered if judicial power is properly to be exercised. Second, and related to the first point, *Alyeska* indicates the deference which the courts should pay to congressional actions—whether, as there, the action be largely inaction to change existing law, or, as here, longstanding and continuing congressional action in the civil rights field indicating that body's unwillingness to extend Section 1983 liability to municipalities. Very bluntly, the *Brault* panel majority's view as to the deference to be shown to congressional action is simply at odds with the view of the United States Supreme Court.

imposing liability under the 14th Amendment but is not a state for the purpose of claiming immunity under the 11th Amendment. Moreover, the incongruity of such a result was apparently brought home to Congress when it enacted Section 1983.

In reviewing the history of the exemption given to municipalities from liability pursuant to 42 U.S.C. §1983, Justice Douglas noted in *Monroe* v. *Pape,* 365 U.S. 167, 190-91 (1960):

> "The objection to the Sherman Amendment [to impose liability upon municipalities] stated by Mr. Poland was that 'the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law.' The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful argument advanced in the affirmative."

The Court then held that it did not have to reach the question whether Congress has the power to make municipalities liable for acts of their officers that violate the civil rights of individuals because Congress' intention to exempt municipalities from such liability was clear.

In holding the Town of Milton liable in damages for violating the 14th Amendment the panel majority appears to have assumed that it possessed a power which Congress eschewed to assume. We submit that the concern of Congress that it lacked the power to subject municipalities to liability, and the Supreme Court's refusal to decide that question, both counsel hesitation by this Court in holding municipalities liable for damages for violation of the 14th Amendment.

There are, in addition, other considerations which, we submit, militate against grounding a cause of action directly upon the 14th Amendment and holding a municipality liable thereon. The 14th Amendment, unlike the 4th Amendment, casts a wide net. Virtually every tort, contract, condemnation and zoning case in which a municipality is involved can be framed in terms of a violation of the 14th Amendment and, under the panel's decision in the instant case, it would appear that, as long as $10,000 in damages are alleged, entry into a federal forum is assured. The result in New York would be that the federal courts attain concurrent jurisdiction with the New York State Supreme Court in virtually every case in which the City is a defendant. The City will not know where it has to defend itself until the plaintiff has done some forum shopping. The plaintiff's choice of forum will largely hinge upon the nature of the defenses available to the municipality in each forum. Moreover, the panel's decision suggests that wherever there is a finding of unconstitutionality, money damages should be allowed. Very respectfully, such a result would be patently improper. Cf. *Matter of Keystone Assoc.* v. *Moerdler,* 33 NY2d 848, 850 (1973) (Breitel, J., dissenting).*

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* In his dissent in *Matter of Keystone Associates,* then Judge (now Chief Judge) Breitel pointed out the chilling effect the award of money damages based upon governmental actions—there held by the Court's majority to constitute a taking—could have on remedial and reform legislation. The *Brault* panel majority holding raises that spectre from the level of dire foreboding to stark reality. It is this stark reality, of course, which in large measure accounts for the City of New York's interest in this law suit.

At a most fundamental level the issue presented here involves considerations of federalism and the longstanding doctrine of sovreign immunity. Given these considerations, we submit that the question of whether municipalities should be held liable in tort for their clearly governmental acts is one properly for state determination.

In the instant case Vermont law apparently holds that a municipality is immune from liability and, therefore, plaintiffs could not successfully sue the Town of Milton in the state courts. Implicit in the panel majority's opinion in the case at bar is that the federal courts will not entertain the defense of municipal immunity. We may only wonder whether all the defenses against and the restrictions upon municipal liability which have been created by the states to protect the fiscal integrity of their cities and towns will also be rejected by the federal courts in cases where the cause of action is purportedly founded upon the 14th Amendment. If some defenses will remain available to the municipalities, we may only speculate as to the court's criteria for determining which defenses are viable in the federal courts and which are not. Will special statutes of limitations applicable to cases against a city in state courts be held to apply? Will state limitations on damages be honored? The unanswered questions left by *Brault* are numerous. Only extensive litigation in the federal courts will provide the answers. In the meantime, our cities and towns will be left uncertain of the degree of their exposure to damage actions in the federal courts.

The panel's opinion herein, if adhered to, will lead both the federal courts and the nation's municipalities down a legal path which can only be dimly perceived at present. We have attempted to point out in this brief some of the pitfalls lurking on that path. As Judge Timbers wrote in his dissenting opinion in the case at bar, "Such holding, virtually of first impression, surely will work mischief in every municipality in the land." As we believe we have demonstrated, there is little to commend this course in terms of legal authority or practical necessity, and this Court should not follow it.

POINT II

Because the appellants litigated their claim against the Town of Milton in the courts of Vermont, the decision of those courts is *res judicata* and bars collateral attack in the federal courts.

(1)

Appellants attacked in the courts of Vermont an injunction secured by the Town of Milton which barred them from operating a trailer park in violation of a local zoning ordinance. The Supreme Court of Vermont held the injunction and the ordinance upon which it was based to be invalid. *Town of Milton* v. *Brault,* 282 A. 2d 681 (1971). On remand, the county court awarded appellants $86,411.00. On appeal, the Supreme Court of Vermont held that the Town of Milton enjoyed sovereign immunity under state law and that the Braults could recover only to the extent that the town had waived its immunity, to wit, $500. *Town of Milton* v. *Brault,* 320 A. 2d 630 (1974).

After litigating in the state courts for some seven years and having only a $500 judgment to show for their efforts, the Braults commenced this action in the federal courts. Among the defenses raised by the Town of Milton to the instant suit was the claim of *res judicata.* The district court, however, dismissed the appellant's action on the ground that the Town of Milton was not a "person" within the meaning of 28 U.S.C. §1983. On appeal, the panel reversed the district court and disposed of the *res judicata* defense in the following footnote (slip op., at p. 1870):

> "5. The Braults are not barred by *res judicata* from raising this constitutional claim in federal

court after state court proceedings in which it might have been litigated but was not. Although *Newman* v. *Board of Education,* [508 F. 2d 277 (2d Cir., 1975)] (per curiam), and *Lombard* v. *Board of Education,* 502 F.2d 631 (2d Cir. 1974), decided this issue in the context of §1983 actions, the holding in *Lombard* expressly assimilated to its rationale suits involving an 'independent supplementary cause of action like an action under the Civil Rights Act [i.e. §1983].* *Id.* at 637. Since the instant claim plainly meets this description, we follow *Lombard* and *Newman* in finding no bar in the prior state proceedings to the present litigation in the federal courts of a constitutional claim not already decided."

Although the City of New York has already had two "bites at this cherry" (see 502 F.2d at 637),** nevertheless, we continue to maintain that *Lombard* and *Newman* were wrongfully decided and ought to be reconsidered and overruled. The federal courts have traditionally employed the doctrine of *res judicata* to prevent the undermining of state court decisions by closing their doors to relitigation of the same causes of action. Mr. Justice

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* Brackets in original.

** A horticultural debate rages over the relative merits of cherries versus apples in the *res judicata* setting. This debate appears to have reached its fruition in a recent article, 43 Ford. L. Rev. 459, 463, fn. 20, wherein a poll of the editors of the Fordham Law Review resulted in an even split of opinion, leaving the question undecided. In fact, the *Lombard* court's use of the term "cherry" may be an unconscious linguistic clue to the proper decision here; ordinarily a cherry affords an opportunity for but one real bite.

Frankfurter, in what remains the leading decision in this area, *Angel* v. *Bullington,* 330 U.S. 183 (1947), explained the scope of the doctrine in the following language (at page 193):

> "The doctrine of *res judicata* reflects the refusal of law to tolerate needless litigation. Litigation is needless if, by fair process, a controversy has once gone through the courts to conclusion. . . . And it has gone through, if issues that were *or could have been* dealt with in an earlier litigation are raised anew between the same parties" (emphasis added).

In both *Lombard* v. *Board of Education,* 502 F. 2d 621 (2d Cir., 1974), *cert. denied,* —— U.S. ——, and *Newman* v. *Board of Education,* 508 F. 2d 277 (2nd Cir., 1975), *cert. den.,* —— U.S. ——, there can be no doubt that the plaintiffs could have chosen, as indeed plaintiff Newman did, to raise their constitutional issues in the actions which they prosecuted in the New York courts. This court, however, refused to apply the doctrine of *res judicata* to close the doors of the federal court to these plaintiffs. We submit that this court's decisions in *Lombard* and *Newman* are incorrect because they fail either to recognize the constitutional and statutory imperatives underpinning the doctrine of *res judicata* or to apply the doctrine as broadly as the Supreme Court has indicated.

(2)

The decision in *Lombard* purports to be based upon policy considerations barring "extension of the *res judicata* doctrine in [that] case to issues of procedural due process which [were] said to raise claims under 42 U.S.C. §1983." 502 F. 2d at 635. Before turning to these

policy considerations, it must be noted that the Supreme Court stated in *Preiser* v. *Rodriguez, supra,* 411 U.S. at 497, that "*res judicata* has been held to be *fully* applicable to a civil rights action under §1983" (emphasis added). It is interesting that the Court did not exempt from the applicability of *res judicata* those cases, arising under §1983, which raise issues of procedural due process.

The first policy consideration which this court in *Lombard* proferred in support of its refusal to apply *res judicata* is that "to apply *res judicata* to a remedy which 'need not be first sought and refused' in the state court, and which actually was not sought would be to overrule the essence of *Monroe* v. *Pape* . . ." (502 F. 2d at 635). We submit that the court's reliance on *Monroe* v. *Pape* is misplaced. While it is true that *Monroe* v. *Pape* held that a plaintiff need not seek redress in a state court before bringing a §1983 action in the federal court, it does not indicate that a plaintiff who has chosen to seek redress in state court must be given a second chance in the federal court.

The second policy consideration offered in support of the court's refusal to apply *res judicata* is related to the doctrine of abstention. According to the court, had Lombard gone directly to a federal court for redress, it would have initially abstained and directed him to the state courts. The court reasoned that he should not be penalized for having gone to the state court in the first instance. This argument fails to explain what matter of New York law was unclear and would have required the federal courts to have abstained had Lombard originally sought redress there. Furthermore, if the federal court would have initially abstained in *Lombard,* the plaintiff nevertheless could have preserved his federal claim for

federal litigation by following the procedures set forth in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1963). Even if this court approves of a plaintiff deciding *sua sponte* that the federal courts would abstain in his case, and therefore, proceeding initially in state court, nevertheless Lombard failed to comply with the requirements set forth in *England* that he preserve his federal claim in the state courts and inform the state courts of his federal claim so that the statute, rule or procedure there under attack could be construed in light of those claims. The latter requirement, which Lombard failed to meet, is designed to encourage judicial efficiency. If state and federal claims are to be split, it is reasonable that the state court, which will be first to rule, have notice of the constitutional claim so that it may exercise its role with a view toward this claim.

The third consideration set forth by this court to justify its refusal to apply *res judicata* is that constitutional claims not previously litigated should not be barred. Traditionally, the federal courts have applied *res judicata* to claims which were or *could have been* raised in prior litigation. See *Angel* v. *Bullington, supra; Johnson* v. *Department of Water and Power,* 450 F. 2d 294 (9th Cir., 1971); *Howe* v. *Brouse,* 422 F. 2d 347 (8th Cir., 1970). Even constitutional claims which have not been raised in prior litigation have been held to be *barred. American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932); *Lovely* v. *Laliberte,* 498 F. 2d 1261 (1st Cir. 1974), *cert. den.,* —— U.S. ——; *Coogan* v. *Cincinnati Bar Ass'n,* 431 F. 2d 1209 (6th Cir., 1970); *Frazier* v. *East Baton Rouge Park School Board,* 363 F. 2d 861 (5th Cir., 1966). Indeed, the decision in *Coogan* was cited approvingly by the Supreme Court in *Preiser* v. *Rodriguez.* 411 U.S. at 497. Confronted by this general application of the doctrine of *res judicata* to claims, wheth-

er constitutional or not, which have been or could have been raised in prior litigation, this court proceeded to create an "exception" to the general application of the doctrine of *res judicata* to §1983 actions for constitutional claims of denial of procedural due process.* The court gave no specific reason for holding that claims of denial of procedural due process are entitled to avoid the application of *res judicata* while other constitutional claims, even claimed deprivations of generally preferred First Amendment rights, are not. Cf. *Lovely* v. *Laliberte, supra,* 498 F. 2d 1261.

Although this court gave no specific reasons for carving out this particular exception to the application of the doctrine of *res judicata,* it raised a general objection to the application of the doctrine to any constitutional claim not specifically raised in a prior litigation.

> "But if the appellant inadvertently or through his lawyer's mistake failed to raise the constitutional claim, it is small comfort to tell him that he should look to the Supreme Court for redress. It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court, he could not get a writ of certiorari from the nonconstitutional judgment of the state court." (502 F. 2d at 636)

The Supreme Court in *American Surety Co.* and other circuit courts in *Lovely* v. *Laliberte* (1st Cir.), *Coogan* (6th Cir.) and *Frazier* (5th Cir.) have not been moved by

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* In *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932), Mr. Justice Brandeis applied *res judicata* in what is apparently a diversity suit to bar a claim of deprivation of procedural due process which plaintiff had failed to raise in his prior litigation in the state court.

the plight of the mistaken plaintiff. Doubtless, these courts recalled that it is axiomatic in our law that the party who errs must bear the burden of his error. In *Lombard,* however, this court shifted the burden of plaintiff's error to the defendant, who is made to bear the expense of both time and money to relitigate the same matter. We submit that the shifting of the expense of the plaintiff's error to the defendant is unwarranted, especially where the plaintiff had available an effective remedy for his attorney's inadvertence, namely, an action for malpractice.

The *Lombard* decision is not only in conflict with the decisions of other courts but introduces theoretical confusion into the application of the doctrine of *res judicata* in this circuit. This confusion results at least in part from the apparent conflict between *Lombard* and a previous decision of this court, *Taylor* v. *N.Y. City Transit Authority,* 433 F. 2d 665 (2nd Cir., 1970), which the *Lombard* decision fails to cite, much less to discuss.

In *Taylor,* the plaintiff brought a civil rights action charging that his dismissal from public employment violated due process. He had previously appealed his dismissal to the City Civil Service Commission, having elected that remedy rather than immediately challenging his dismissal under New York C.P.L.R. Article 78. At that time he raised no constitutional issues. In his subsequent state court challenge to the decision of the Civil Service Commission, he raised procedural due process grounds, but his suit was dismissed for failure to raise these claims before the Commission. He then challenged his dismissal in federal court. In dismissing the complaint, Judge Weinstein stated (309 F. Supp. 785, 793):

> "The State provided an adequate means for the vindication of the plaintiff's constitutional interests. He could have sought direct review of the TA's

> action in the State Courts. Alternately, he had the opportunity to assert his constitutional claim before the Commission. In providing these options, which plaintiff failed to exercise, the State afforded him due process of law, and the decisions of the State tribunals should now be accorded determinative effect."

This Court affirmed the dismissal of Taylor's federal claim, noting that at no time was the constitutional issue, now raised, raised in the State proceedings. 433 F. 2d at p. 667. This Court then stated (433 F. 2d at p. 668):

> "Had appellant prosecuted his constitutional objection in a timely manner, and had the Commission made an unsatisfactory disposition thereof, the Courts of New York, in the exercise of their responsibility under the Supremacy Clause of the United States Constitution to entertain federal constitutional questions, no doubt would have taken jurisdiction of appellant's case."

This Court then concluded (433 F. 2d at p. 671):

> "[W]e do not perceive a compelling federal interest to be vindicated which would necessitate overriding clearly strong New York State interests with regard to the finality of State agency decisions and the regulation of State employee behavior, within judicially supervised constitutional limits, of course. To allow collateral attacks on these interests in a federal forum would be to deliver unnecessary and potentially debilitating blows to legitimate areas of State responsibility.
>
> Appellant has made his statutory election, and by his own admission effectively tied the hands of the

> New York Courts, whose judgment we feel bound to honor. He must now live with his decision."

See, also, *Tang* v. *Appellate Division of New York Supreme Court, First Dept.*, 487 F. 2d 138 (2d Cir., 1973), *cert. denied*, 416 U.S. 906 (1974).

The theoretical approach taken by this court in *Lombard* also conflicts with that taken only two months earlier in *Thistlethwaite* v. *City of New York*, 497 F. 2d 339 (2d Cir., 1974), *cert denied*, —— U.S. —— (1975). In *Thistlethwaite*, the plaintiffs were criminally convicted of distributing a pamphlet in Central Park without a permit. Plaintiffs unsuccessfully challenged their convictions in the state courts, on the ground that the permit system was unconstitutional. After failing there, they turned to the federal courts and commenced a §1983 action for a declaratory judgment to set aside the permit system as unconstitutional. This court affirmed the district court's determination that the §1983 action was barred by *res judicata*. Of course, *Thistlethwaite* is facially distinguishable from *Lombard* because Thistlethwaite had raised his constitutional claim in the state courts and Lombard never raised the question until he commenced his federal action. However, Lombard chose to commence an action in the state courts before going to federal court while Thistlethwaite had the choice imposed upon him by his arrest and prosecution. Obviously, the implicit view of this court in *Lombard* that §1983 is a guarantor of a choice of a federal forum for federal claims and that this guarantee is so important that the doctrine of *res judicata* must bow before it was not shared by this court when it decided *Thistlethwaite* only two months before. For, in *Thistlethwaite*, this Court found the policies behind the doctrine of *res judicata* so important that it there indicated that a plaintiff in order to preserve his constitutional claim for con-

sideration in the first instance by the Federal courts would have to forego even raising defensively that claim in a state criminal case and risk consequent criminal conviction. Quite clearly, a vast shift in this court's view of the balance between the policy considerations underlying the doctrine of *res judicata* and those underlying §1983 took place in a very short time.

Lombard was followed and extended by *Newman* v. *Board of Education, supra,* 508 F. 2d 277. In *Newman* this court refused to apply the doctrine of *res judicata* in a case where the plaintiff had clearly made due process and equal protection claims in the prior state court litigation. The Court held, however, that the mere mention of "due process" in one's state court pleadings is not sufficient to "raise" the constitutional claim in the state courts and thereby preclude the relitigation of the claim in federal court. The court went on to hold that "elaborations or citations of authority" are required in state court pleadings if the doctrine of *res judicata* is to be applied. However, no suggestion was given as to the type or degree of elaboration to be required by a federal court in order for it to find that the constitutional claim was "raised" in the state court. Moreover, the decision even appears to imply that the doors of the federal court are open to a plaintiff whose constitutional claim is so frivolous that he was unable to give any citations of authority to support it in his state court pleadings—but are closed to a plaintiff whose claim has been supported by citations.

It is scarcely surprising that the *Lombard* decision has met with criticism in the scholarly journals.* Indeed, a recent note in the Harvard Law Review properly points

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* See 88 Harv. L. Rev. 453; 43 Ford. L. Rev. 459.

out that the entire decision rests upon the false assumption that the federal courts are free to reach their own determination of the *res judicata* effect to be given to state judgments. On the contrary, as the note author points out, the Full Faith and Credit Clause of the United States Constitution, and 28 U.S.C. §1738, by which that clause is statutorily made applicable to the federal courts, require that the federal courts give *full,* not *some,* credit to valid judgments of the state courts. *Davis* v. *Davis,* 305 U. S. 32 (1938). Indeed, that statute requires the federal courts to give state judgments the same full faith and credit which they are accorded in the courts of the state of rendition, *i.e.,* it obliges the federal courts to apply the law of *res judicata* of the state of rendition. *See St. John* v. *Wisconsin Employment Relations Bd.,* 340 U.S. 411 (1951); *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932). See, also, 1B J. Moore, *Federal Practice* ¶0.406[1].

Lombard, we submit, presents no cogent reasons for overriding the policy mandated by 28 U.S.C. §1738. Had this policy been honored in *Lombard* and the New York doctrine of *res judicata* been applied it is clear that Lombard's claim would have been barred.

> "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, *but also as to any that might have been so litigated,* when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first . . ." (Emphasis supplied).

Schuylkill Fuel Corp. v. *B&C Nieberg Realty Corp.,* 250 N.Y. 304, 306-307, 165 N.E. 2d 456 (1929). See also, Weinstein, Korn & Miller, *New York Civil Practice* ¶5011.17.

In addition, besides ignoring the mandate of §1738, *Lombard* and *Newman* ignore the policy arguments for according deference to state court judgments enunciated in *Taylor*—clearly stated and reasonable arguments never answered in either *Lombard* or *Newman*.

We submit that *Lombard* and *Newman* ought to be reconsidered and overruled so that the doctrine of *res judicata* may be applied to §1983 actions in this circuit in the same manner as it is applied in other circuits and as approved by the Supreme Court in *Preiser* v. *Rodriguez*, 411 U.S. 475, 497 (1973).

CONCLUSION

The Order of the United States District Court for the District of Vermont should be affirmed.

May 21, 1975

Respectfully submitted,

W. Bernard Richland,
Corporation Counsel of the City of New York, Attorney for the Amicus Curiae.

L. Kevin Sheridan,
Michael Ambrosio,
of Counsel.

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 21 day of May 19 75, he served the annexed Brief upon Leibman Goodman Schwartz et al., the attorney for the Appellee. herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. P.O. Box 568 in the ~~Borough~~ of Burlington, ~~City~~ of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 21 day of May 19 75

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Carlos M Rodriguez

Form 323-40M-703823(73) 346

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Carlos M Rodriguez being duly sworn, says that on the 21 day of May 1975, he served the annexed OBJCF upon John A Burgess Esq., the attorney for the Appellee herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. P.O. Box 766 in the Borough of Hempstead, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this 21 day of May 1975

John Calia

Carlos M Rodriguez

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
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